Supreme Court, U.S.
FILED
JUN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1890

In The

Supreme Court of the United States

October Term, 1988

HOWARD L. BEYER, Superintendent, and
PETER N. PERRETTI, JR., Attorney General
of New Jersey,

Petitioners,

v.

JOHN MICHAEL HUMANIK, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL I. RACHMIEL
Attorney at Law
99 Morris Avenue
Springfield, New Jersey 07081
(201) 467-9200
Attorney for Respondent

JOEL I. RACHMIEL, ESQ.
and
MICHAEL H. KESSLER, ESQ.
Of Counsel &
on the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the principle of due process articulated in *In re Winship*, 397 U.S. 358 (1970) and *Martin v. Ohio*, 480 U.S. 228, 233-34, *reh'g denied*, 481 U.S. 1024 (1987) that in a criminal case the State must prove each element of the charge beyond a reasonable doubt are violated in a State which recognizes the diminished capacity defense by a jury instruction that "since the defendant contends he suffered from a mental disease or defect which prevented him from having a state of mind which was an *essential element of the offense* . . . he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence"?

2. Whether possible curative instructions, *not given in the instant case,* might save a statute (which requires that a defendant who asserts his innocence because of a mental condition which negates an element of the crime with which he is charged to prove such mental condition by a preponderance of the evidence) from violating due process, as suggested by the New Jersey Supreme Court *albeit* disputed by the Third Circuit Court of Appeals.

3. In a case where substantial evidence was presented that the defendant suffered from a mental disease or defect, where the expert opinions presented by the defense were that the defendant did not possess the requisite mental state at the time of the commission of the crime, *where the State's experts conceded that the defendant was abnormal* but opined that such condition did not prevent his formation of the requisite mental state, where such factual conflict was the only issue to be decided by

QUESTIONS PRESENTED FOR REVIEW (Cont.)

the jury, and where a Federal Court has concluded that the State Court impermissibly gave the jury an unconstitutional understanding of their task, must that Federal Court discuss the law of "harmless error" before issuing a writ of *habeas corpus*?

4. Whether it is the prerogative of a State's judiciary, in attempting to sustain a conviction which violates the constitutional prohibition against *ex post facto* laws in the guise of statutory construction, to disregard the explicit instructions of that State's legislature and prior decisions of that Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 4

ARGUMENT 16

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT SHOULD NOT PERMIT SEMANTIC OBFUSCATION TO FURTHER DELAY THE TERMINATION OF AN UNLAWFUL INCARCERATION 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES CITED

Burger v. Kemp, 483 U.S. 776 (1987) 19, 20

Duncan v. Missouri, 152 U.S. 377 (1894).....11, 17

Hopt v. Utah, 110 U.S. 574 (1884)..... 11

In re Winship, 397 U.S. 358 (1970) 10, 17

Kring v. Missouri, 107 U.S. 221 (1883).....11, 17

Martin v. Ohio, 480 U.S. 228 (1987) 14, 16, 19

Mullaney v. Wilbur, 421 U.S. 684 (1975).....10, 14

Patterson v. New York, 432 U.S. 684 (1975).....13, 14

Rose v. Clark, 478 U.S. 570 (1986).....19, 20

Sandstrom v. Montana, 442 U.S. 510 (1979).....10, 20

State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987) 12, 13, 14, 15, 19, 20

State v. Galiyano, 178 N.J. Super, 393 (App. Div. 1981)..... 9

State v. Zola, 112 N.J. 384, 548 A.2d 1022 (1988) *cert. denied.*, 109 S. Ct. 1146 (1989) 16, 19, 20

Wilson v. Tard, 593 F. Supp. 1091 (D. N.J. 1984)..... 18

STATUTES CITED

N.J.S. 2C:1-1(c)(1)..... 8

N.J.S. 2C:1-13..... 2, 8, 11, 17

N.J.S. 2C:2-26..... 4

N.J.S. 2C:4-2..... *passim*

N.J.S. 2C:11-3.....3, 14

No. 88-1890

In The

Supreme Court of the United States

October Term, 1988

HOWARD L. BEYER, Superintendent, and
PETER N. PERRETTI, JR., Attorney General
of New Jersey,

Petitioners,

v.

JOHN MICHAEL HUMANIK, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Article I, Section 10

No state shall enter into any treaty, alliance, or confederation; grant Letters of Marque and Reprisal; coin money; emit Bills or Credit; make anything but gold or silver a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts, or grant any Title or Nobility.

United States Constitution, Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statute 2C:1-13
L.1978, c.95 (effective September 1, 1979)

a. No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

b. Subsection a. of this section does not:

(1) Require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or

(2) Apply to any defense which the code or another statute requires the defendant to prove by a preponderance of evidence or such other standard as specified in this code.

New Jersey Statutes 2C:4-2
L. 1978 (Effective September 1, 1979)

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to

prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

New Jersey Statutes 2C:4-2
(West 1982)

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense. Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

New Jersey Statutes Annotated 2C:11-3(a)(1)
and (2)
L. 1978, c. 95 (effective Sept. 1, 1979)
amended L. 1979, c. 178 (effective Sept. 1, 1979).

Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death. . . .

New Jersey Statutes Annotated 2C:2-2b
(West 1982)

(1) Purposely. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) Knowingly. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

COUNTERSTATEMENT OF THE CASE

Both the State and defense experts agreed that Respondent was abnormal, but they differed with regard to the exact diagnoses and whether it prevented Respondent from having the mental state required for conviction of a knowing and purposeful murder. *The State's* witnesses opined that Respondent had a personality disorder, in consequence of which he was inflexible in his approach to life and would characteristically act impulsively, (Transcript of April 1, 1982, T12 – 8; T13 – 3 to 6;

T15 – 20 to 25). They also felt that he was a paranoid personality who, when under stress, was likely to act with irrational and aggressive behavior accompanied with a diminished capacity to determine what was reasonable behavior or the implications of such behavior. (*Id.*, T113 – 7 to 18; T126 – 1 to 5; T129 – 5 to 8).

The defense experts were of the opinion that Respondent suffered from a borderline personality disorder nearing psychosis, (Transcript of March 29, T80 – 7 to 9; 142 – 6 to 12), with hairline-thin control over his actions, which were characteristically impulsive and unpredictable. (*Id.*, T47; T81 – 15). They further testified that this condition stemmed from the absence of love during Respondent's formative years. (*Id.*, T54 – 2 to 10).

Respondent had been abandoned by his mother while he was an infant, (*Id.*, T93 – 14 to 15), and then spent four years in foster homes before his aunt was able to arrange for him to live with her. (*Id.*, T97 – 4 to 5). His father played no significant role in his life. (*Id.*, T53 – 23 to 54 – 1).

In July of 1978, when Respondent was eighteen years of age, he met the deceased, (Transcript of March 30, 1982, T5 – 25 to 8 – 25), Lisa Guzzo, who was not yet thirteen. (*Id.*, 8 – 22 to 9 – 9). Despite the fact that males of that age do not usually have designs on girls six years younger then they are, (Transcript of March 29, 1982, T46 – 10 to 16), for Respondent it was "love at first sight". (Transcript of March 30, 1982, T6 – 8).

During that time Respondent also met the deceased's mother, (*Id.*, T5 – 25 to 6 – 35), whom he began to call "mom" almost immediately, and whom he continued to

refer to as "mom" even after the killing of her daughter. (Transcript of April 1, 1982, T134 – 1 to 136 – 10). Shortly after meeting the Guzzo family, and for the next three years, Respondent spent almost every weekend and most of his free time living with them. (Transcript of March 30, 1982, T10 – 20 to 13 – 18).

On August 5, 1981, Lisa Guzzo told Respondent that she no longer loved him and that she did not want to see him any more. (*Id.*, T22 – 12 to 13 – 2). The defense expert opinion was that to Respondent, her rejection constituted a loss of the way of life Respondent had started to envision, (Transcript of March 29, 1982, T155 – 20 to 23), and was extremely stressful to him, resulting in a loss of his concept of being and masculinity. (*Id.*, T148 – 8 to 11; 154 – 21 to 23).

For several days thereafter, Respondent did not sleep. Rather he dwelled on the situation and harbored thoughts of killing himself, the deceased, or her new boyfriend. (Transcript of March 30, 1982, T25 – 22 to 27 – 7; T50 – 3 to 17; T53 – 4 to 7; T63 – 15 to 17; T73 – 4 to 8).

On August 12, 1981, after hiding in the woods near the Guzzo home until "mom" and Mr. Guzzo left, (*Id.*, T88 – 20 to 89 – 4), Respondent created a distraction by lifting Lisa's puppy and using its paws to knock on the sliding glass window. When Lisa came out to put the puppy back in its pen, Respondent snuck into the house armed with a gun and a knife. (*Id.*, 92 – 11 to 93 – 13).

According to the *State's witnesses*, after telling the deceased, her sister Gina, and Stanley Emanuels, the deceased's new friend, to sit in the "rec room", Respondent put the knife away. (Transcript of March 23, 1982,

T26 – 2 to 21; 32 – 17 to 20). At some point, Lisa said that she was going to call her parents, causing Respondent to tear the telephone off the wall. (*Id.*, T30 – 13 to 32 – 14). Respondent soon put the gun in his waist band, but later took it out again. (*Id.*, T79 – 16 to 80 – 13). Thereafter, Respondent continually stated that he did not want to hurt anyone, (*Id.*, T85 – 8 to 10), and repeatedly looked out the front window whenever he heard something. (*Id.*, T37 – 8 to 23). While Respondent spoke to the deceased, the State's principal witness found what was happening on TV more interesting. (*Id.*, T29 – 13 to 30).

According to the *State's witness*, during the two and a half hours which followed his entry into the Guzzo home, Respondent talked about his feelings for the deceased, her family, his job and asked her whether she wanted some cheese cake. (*Id.*, T34 – 12 to 14; T87 – 23 to 24). Respondent also spoke with Stanley Emanuels about their respective schools and plans for the future. (*Id.*, T52 – 13 to 18).

Again, according to the State's witness, everyone discussed what TV program they should watch and ultimately agreed upon M.A.S.H. Respondent and the deceased then returned to "small talk". (*Id.*, T36 – 13 to 19). About the time M.A.S.H. was ending, a car arrived. (*Id.*, T68 – 8 to 13; T37 – 22 to 38 – 1).

Thereupon, Respondent went to the front window, and said: "This is where I make my exit". (*Id.*, T38 – 5 to 8). With gun in hand, Respondent ran to the sliding door, saying "Gina, I'd never hurt you", "Stan, we could have been friends." and "Lisa" (*Id.*, T96 – 12 to 16).

As Respondent said "Lisa," a shot was fired. (*Id.*, T99 – 2: T83 – 24). It was the opinion of the defense psychological experts that Respondent did not knowingly and purposefully commit the homicide. (Transcript of March 29, 1982, T58 – 1 to 7: T166 – 19).

A little less than two years before the killing, the New Jersey Legislature had enacted a complete revision of New Jersey's penal laws, now known as the Code of Criminal Justice. The Code became effective on September 1, 1979. Chapter 178, Section 148 of the Laws of 1979.

At the time of the homicide, The Code provided:

N.J.S. 2C:4-2

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

N.J.S. 2C:1-13 provides, with regard to "Code offenses," that a defense is an affirmative defense when it arises under a section of the Code *which so provides*. The State has the burden of disproving even affirmative defenses unless the Code or another statute place that burden on the defendant. Indeed, N.J.S. 2C:1-1(c)(1) provided that procedural provisions of the Code were to be applied to any pending pre-Code case unless confusion or delay would result.

In construing those statutes, the Appellate Division of the Superior Court of New Jersey had held that under the Code, in the absence of a provision to the contrary,

the State had the burden of disproving even affirmative defenses. *State v. Galiyano*, 178 N.J.Super. 393, 397 (App. Div., 1981).

Effective *the month following* the homicide, N.J.S. 2C:4-2 was amended to provide that:

> Mental disease or defect is an affirmative defense which must be proved by a preponderance of the evidence.

Over Respondent's objections at trial that to charge in conformity with the amendment to the diminished capacity statute would violate both the prohibition against *ex post facto* laws and federal due process standards which require the State to prove every element of the offense charge beyond a reasonable doubt, the trial court charged the Jury as follows:

> Now, it's obvious and we're all familiar with the fact that a pistol is capable of producing death or serious bodily injury leading to death, and therefore, in your deliberations, you may consider the weapon used, the manner and circumstances of the victim's death, and since there is no question that Mr. Humanik, with weapon in his hands, shot and killed the victim, *you may infer from that fact* and from the manner of the circumstances of the killing *what the defendant's purpose or knowledge was* at the instant or what it was not.
>
> Now, the defense contends that the defendant did not at the time the shot was fired act either purposely or knowingly as I have defined the terms. He contends that he was suffering from some mental disease or defect *which prevented him from having a state of mind, which is an essential element of the crime of murder as I've defined it* . . .

> In connection with the *question of the defendant's mental state* at the time in question, since the defendant has raised the defense, that is, the defense that he had a *mental disease or defect* at the time *which prevented him from having a state of mind the law says he would have to have,* that is a knowing or purposeful mental state in connection with the killing, *he has the burden to prove that he had such mental defect or disease by a preponderance of the evidence.* (Transcript of April 1, 1982, T130 – 11 to 131 – 20)

The United States Constitution requires the prosecution in every criminal case to prove each and every fact necessary to constitute the crime charged beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970); *Mullaney v. Wilbur,* 421 U.S. 684 (1975). Moreover, in *Sandstrom v. Montana,* 442 U.S. 510, 61 L Ed2d 39 at 45 (1979), this Court held that it is a violation of Due Process to instruct the jury that they can infer from the very doing of the act the necessary mental element prohibited by the offense charged.

In *Sandstrom,* this Court noted that careful attention must be given to what was actually charged since the question ultimately turns upon the way in which a reasonable jury could have interpreted the jury instruction. This Court held that the constitutionality of jury instructions must be considered *vel non.* Thus, we were instructed that a trial court may not constitutionally withdraw an issue from jury consideration by an instruction that the law raises a presumption of intent from an act since such would effectively eliminate the necessity of the State to prove intent as an element of the offense, thereby conflicting with the overriding presumption of innocence.

Moreover, Article 1, Section 10 of the United States Constitution provides that "No State shall . . . pass any *ex post facto Law* . . . " This Court has held that the prohibition is violated where the new law alters the situation to the disadvantage of the accused, *Duncan v. Missouri*, 152 U.S. 377 (1894); or lessens the degree, amount, or measure of proof which is necessary for the state to convict, *Hopt v. Utah*, 110 U.S. 574 (1884); or makes a change which impairs his defense even if the change is designated as "procedural." *Kring v. Missouri*, 107 U.S. 221, 27 L.Ed. 506 (1883).

The fact that the foregoing Federal Constitutional Provisions had been violated in his case was brought to the attention of the Trial Court and the Superior Court of New Jersey, Appellate Division, by Respondent. But his arguments were *ignored*. Rather than squarely face the issue and attempt to establish a reasonable basis for concluding that the *ex post facto* issue was not controlled by the Legislature's express declaration that in the absence of a statute the burden was on the State to disprove even affirmative defenses, *N.J.S. 2C*:1-13, or that prior case law was in error in so holding, the Appellate Division declined to address the Legislation and its prior pronouncement. Rather, the Court predicted its discussion by analogizing the case before it to one having to do with a *Non-Code* defense.

Similarly, the Appellate Division chose not to discuss the Due Process issues Respondent raised in the *light of the charge actually given*. Rather, the Court suggested that the Legislature could constitutionally require the defense to rebut the presumption of mental normalcy as long as

the prosecution bore the burden of establishing the requisite state of criminal culpability beyond a reasonable doubt.

The New Jersey Supreme Court chose not to consider Respondent's petition for Certification. However, by the time Respondent petitioned the United States District Court for the issuance of a writ of *habeas corpus*, the New Jersey Supreme Court had rendered its decision in *State v. Breakiron*, 108 N.J. 591 (1987), wherein the interplay between New Jersey's statutory law governing culpability and its statutory law governing diminished capacity were discussed.

In *Breakiron*, the defendant had entered the defense of insanity and presented substantial evidence as to his mental state at the time of the commission of the homicide for which he was charged. As in the instant case, the fact of the homicide was conceded and the sole factual contentions in defense centered upon the defendant's mental state. The trial court in *Breakiron* allowed such evidence to go before the jury upon this issue of insanity but refused to charge the jury as to what effect such evidence might have upon the issues of culpability: *i.e.* the "diminished capacity" defense. In upholding the conviction on appeal, the Appellate Division held that it was for the Trial Court to determine as a "matter of law" whether the defendant had established by a preponderance of the evidence that a mental condition existed which had resulted in an act that was lacking in either the knowledge or purpose required by the Code for conviction. The New Jersey Supreme Court reversed.

In *Breakiron*, the New Jersey Supreme Court traced the history of the *laws* regarding mental illness or deficiency, and their roles in the criminal justice system. The Court recognized that there were THREE species of the defense of "diminished capacity".

Those three species may be identified as: avoidance; mitigation; and negation. Although it did not use the term "avoidance", the Supreme Court recognized that, essentially, the classic defense of insanity which has been carried into current law under the Code is one of "avoidance": the defendant does not dispute either that the prohibited act was done, nor that it was done with the prohibited intent, but seeks to avoid punishment by reason of other facts, i.e., that he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong. (the classic *M'Naghten* rule). In reversing *Breakiron*, the Supreme Court recognized that "diminished capacity" under N.J.S. 2C:4-2 is not a subset of the defense of insanity and thus, not a defense of avoidance.

The second species of the "defenses" of diminished capacity is that of "mitigation". The *Breakiron* court discussed that species in the context of *Patterson v. New York*, 432 U.S. 684 (1975), noting that under New York law, although it was the State's burden to prove all elements of the offense beyond a reasonable doubt, the United States Supreme Court had held that it was not a denial of due process to require that a defendant bear the burden of proving that the crime was committed under "extreme emotional disturbance" in order to mitigate or reduce the penalty to that for a "lesser crime". The *Breakiron* Court

noted that under New Jersey's capital sentencing structure, N.J.S. 2C:11-3, diminished capacity could have such a "mitigating" effect. It held, however, that *diminished capacity is NOT a mitigation defense in the guilt phase of a trial.*

The conclusion of the *Breakiron* Court was that the function of N.J.S. 2C:4-2 was to "negate" an essential element of the offense with which the defendant was charged.

On two occasions since *Mullaney,* this Court has allowed convictions to stand despite the fact that some burden was placed upon the defendant. Those occasions were *Patterson, supra.,* and *Martin v. Ohio,* 480 U.S. 228, 94 L Ed2d 267, 107 S.Ct. 1098 (1987). *Patterson,* as aforesaid, was a case where the defendant was permitted to mitigate the crime by reason of his extreme emotional disturbance. *Martin* was a homicide where the defendant claimed that she had acted in self-defense, but where, under Ohio law the burden of proving self-defense by a preponderance of the evidence was cast upon the defendant.

Although the *Breakiron* Court mentioned *Martin* in the context of its discussion of "mitigation", this Court's analysis there more properly falls within the sphere of "avoidance". The *Martin* Court noted that such defense under Ohio law neither disputes the act itself, nor that it was done with intent to injure another. Rather, the defense sought to avoid penal sanctions by interposing other facts which justified such use of force. Indeed, the *Martin* Court also pointed out that while it was not a denial of due process for a State to impose the burden of

proof as to justification upon a defendant, it was the obligation of the trial court to assure that the jury was instructed that the evidence presented upon the "self-defense" issue also bore upon the elements of the offense charged, and that such evidence could be considered in the context of "reasonable doubt", upon which the State had the burden of proof.

No decision by this Court has permitted the State to shift the burden of proof to a defendant upon any fact which would establish or negate an element of an offense. The *Breakiron* Court attempted to sustain the constitutional validity of N.J.S. 2C:4-2 through a sleight of hand. It suggested that N.J.S. 2C:4-2 does nothing more than present a presumption as to facts not in issue – the defendant's mental capacity – unless raised by the defendant and, if so raised, that N.J.S. 2C:4-2 still remains permissible to cast the burden of proof "as to his mental condition" upon the defendant since his mental condition is not an element of the offense.

Although the Honorable Freda L. Wolfson, United States Magistrate, concluded that the State Court had not properly decided Respondent's claim of *ex post facto* law violation, the Honorable Garrett E. Brown, Jr., United States District Court Judge, ruled that no such violation had occurred since N.J.S. 2C:4-2 did not impermissibly shift the burden of proof as to an element of the offense to the defendant. Judge Brown further held that since the "record establishes guilt beyond a reasonable doubt" any violation of the *ex post facto* prohibition was harmless.

The Third Circuit Court of Appeals concluded that *because* "State courts are the ultimate expositors of state law . . . we are bound by their constructions except in rare

instances." Thus, the Court did not address the claim that the imposition of the burden of proof upon the Respondent violated the prohibition against *ex post facto* laws. The Third Circuit did conclude, however, that the charge in the instant case did not meet the requirement expressed by the New Jersey Supreme Court in *Breakiron* or *State v. Zola*, 112 N.J. 384, 548 A.2d 1022 (1988), not to mention those expressed by this Court in *Martin*. It additionally found that the Court's instruction, when taken as a whole, did not cure the defective instruction since nothing in the charge diluted the express improper instruction. It further held that general statements respecting the State's burden of proving each element of the offense beyond a reasonable doubt did not cure the problem since the charge, taken as a whole, created a reasonable likelihood that the jury received an unconstitutional understanding of their task. Finally, the Court of Appeals concluded that not even the giving of instructions as recommended by the New Jersey Supreme Court in Zola could save N.J.S. 2C:4-2 from being unconstitutional because, so construed, the State would be permitted to impose a "preponderance of the evidence filter" which may bar consideration of evidence tending to raise a reasonable doubt as to an element of the offense.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT SHOULD NOT PERMIT SEMANTIC OBFUSCATION TO FURTHER DELAY THE TERMINATION OF AN UNLAWFUL INCARCERATION

This should not have been a difficult case. There was nothing clearer than New Jersey's Legislative directive,

existent both at the time of the homicide and at the time of the trial, that it was the State's burden to disprove even affirmative defenses unless the Code or another statute otherwise provided. N.J.S. 2C:1-13 a and b(2). But, by the time of the trial, the Legislature had amended N.J.S. 2C:4-2 to cast the burden of proving a mental disease or defect upon the defendant. Then, by the use of the term "procedure," the trial court altered the rules of the game. That the improper use of "procedure" to violate a defendant's rights was curtailed by pronouncements of this Court, *Krieg, supra., Duncan, supra.*, was of no moment to the trial court.

It is significant that in dealing with this issue, the State has chosen the road of avoidance. On the Appellate level, the Court chose not to discuss how, in the interpretation of legislation, one can disregard the plainly expressed directive of the Legislature. No attempt was even made to transform the meaning of what the Legislature said by "construction" or some other hallowed method of manipulating words. It was simply ignored.

While it may be true that State Courts are generally the ultimate expositors of its own laws, it is respectfully submitted that one of the exceptions to that rule must be when a State elects to disregard the "facts" of its own prior legislative acts and pronouncements. Were this not the case, then the prohibition against *ex post facto* laws would be rendered nugatory. A similar semantic problem surrounds the issue of whether, despite clear pronouncements by this Court that Due Process of Law requires that the State must bear the burden of proving beyond a reasonable doubt every fact necessary to convict, *Winship, supra.*, a State may constitutionally instruct a jury that the

defendant has the burden of proving a mental disease or defect which would prevent him from having a state of mind which is an essential element of the crime. The District Court, *albeit* in another case, *Wilson v. Tard*, 593 F. Supp. 1091 (*D. N.J.*, 1984), saw the element of the offense and the claim of the defense as being mirror images of each other. The Court of Appeals in the instant case, while recognizing that there was a distinction, determined that in the absence of clear instructions, not given in the instant case, a jury would not be able to draw upon it. This is so because what we have here is a distinction without a difference.

The issue is more clearly placed in context when it is recalled that a mental disease or defect *which did not bear* upon a requisite element of the charge would be *irrelevant* and not presented to the jury under New Jersey Law. While it is true that in some instances a defendant may be suffering from some mental defect *irrelevant* to the formation of the purpose or knowledge required by the offense charged, once that relevence is established, such condition can not be judicially separated from the operative facts of the case and the State's burden to prove purpose or knowledge.

That Courts may express some doubts as to the wisdom of recognizing any defense predicated upon so elusive a fact as the condition of someone's mind should not serve as justification for permitting their analysis to become clouded. Whether "diminished capacity" should or should not be a defense is just as exclusively a matter of that State Legislature's concern as is the designation of the crime itself.

Given that, the situation is clearly analogous to the "alibi" defense. While there are crimes which may be committed by an absent defendant, where the State, *in order to prove that the defendant committed the crime,* must prove that the defendant was *present,* and the defendant presents evidence that he was elsewhere, *identity* becomes an element which the State must prove beyond a reasonable doubt. In such a case, it is frivolous to suggest that, unless put in issue, identity is not an element of the offense and, therefore, the State can impose upon the defendant the burden of proving that it was not he who committed the offense.

It has been said that the primary role of government is to protect its citizens. To do so, we must remain a society governed by laws.

The actual legal issue raised by this case, the constitutionality of the trial court's instructions *vel non,* was resolved by this Court in *Martin,* which case was properly applied by the Court of Appeals in rendering its judgment herein.

That these may be some way to construe N.J.S. 2C:4-2 so that some jury instructions could avoid violating the Due Process Clause is an issue best left for another case and another day. This is not such a case. Indeed, this is not even a case which can withstand scrutiny under New Jersey's pronouncements in *Breakiron* and *Zola.*

Lastly, the Petitioner's claim that this Court should grant the Writ to consider the Court of Appeals decision in the light of *Rose v. Clark,* 478 U.S. 570 (1986) and *Burger v. Kemp,* 483 U.S. 776 (1987) might have more merit had *Rose* been properly understood by petitioner.

In *Rose*, this Court was concerned with whether a charge unconstitutionally shifting the burden of proof in violation of *Sandstrom* could be harmless error. The Court of Appeals had reasoned that solely because malice had been factually contested, the burden shifting instruction could not be harmless. This Court held that it could be harmless when, *on the record as a whole, the error is harmless beyond a reasonable doubt . . . The inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.*

The *Burger* Court was able to do so on the evidence before it. There defendant and his co-indictee had kidnapped Roger Honeycutt at knife point, robbed and sodomized him, blindfolded and tied his hands, and placed him in the trunk of the vehicle they had stolen from him. They then drove him to a lake, opened the trunk, asked him if he was all right, received his assurances that he was, closed the trunk, started the car, put it in gear, and watched it ride into the lake, where Honeycutt drowned.

In the instant case, Respondent, the deceased, and two others discussed what television programs to watch and for most of two and a half hours engaged in small talk. There was not only clearly conflicting expert evidence, but, *perhaps more importantly*, a solid basis of facts from which the experts could draw their differing conclusions.

This case is neither *Burger*, nor *Zola*, nor *Breakiron*. This is simply a case where unconstitutional instructions were, without any ameliatory additions, given over

Respondent's timely and pertinent objection, to his detriment.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this Court should deny the petition for the issuance of a writ of certiorari.

Respectfully submitted,

JOEL I. RACHMIEL, ESQ.

Attorney for Respondent

DATED: June 23, 1989